

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
U. S. BUREAU OF RECLAMATION,)
QUINCY-COLUMBIA BASIN IRRIGATION)
DISTRICT, EAST COLUMBIA BASIN)
IRRIGATION DISTRICT, and SOUTH)
COLUMBIA BASIN IRRIGATION)
DISTRICT,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY, and)
COLLIN E. and LEORA SKANE,)

Respondents.)

PCHB Nos. 80-36, 80-37,
80-38, and 80-39

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER ON BIFURCATED ISSUE

This matter, the consolidated appeals from the issuance of a surface water permit to Collin E. and Leora Skane, came before the Pollution Control Hearings Board, David Akana (presiding) and Gayle Rothrock, at a formal hearing on September 29, 1981, in Ephrata, Washington.

Appellant U. S. Bureau of Reclamation was represented by its

1 attorney, William N. Dunlop; appellant Quincy-Columbia Basin
2 Irrigation District was represented by its attorney, John Baird;
3 appellant East Columbia Irrigation District was represented by its
4 attorney, Richard A. Lemargie; appellant South Columbia Basin
5 Irrigation District was represented by its attorney, William E.
6 Davis. Respondent Department of Ecology was represented by Wick
7 Dufford, Assistant Attorney General; respondents Skanes were
8 represented by their attorney, William J. Plonske.

9 By agreement of the attorneys, the merits and issues were
10 bifurcated for hearing. The issue tried on September 29, 1981, was
11 whether the water supply as used at Skane's facility is ground water
12 or surface water. The parties offered testimony from witnesses and
13 documentary evidence in support of their respective cases.

14 From the testimony heard, exhibits examined, and post hearing
15 briefs of counsel, the Board makes these

16 FINDINGS OF FACT

17 I

18 On April 10, 1979, Collin E. and Leora Skane filed an application
19 for a permit to appropriate public surface waters of the state (No.
20 S3-26217). The proposed point of diversion is within the south half
21 of Section 3, Township 20 N, Range 28 EWM in Grant County. The water
22 will be used on portions of property described as Farm Unit 55, Second
23 Revision of Irrigation Block 40, Columbia Basin Project and an area
24 lying northeasterly of Irrigation Block 40. The location of the point
25 of diversion and place of use are entirely within the Quincy Basin

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1 Subarea as described in chapter 173-124 WAC.

2 II

3 The application requests surface water from the Gloyd Seeps area,
4 a tributary to Crab Creek, for non-consumptive use in a fish
5 hatchery. The applicant originally sought 5.0 cubic feet per second
6 (CFS) which was increased to 20 CFS by the Department of Ecology (DOE)
7 with the assent of the applicant.

8 Notice of the application was published on June 22 and 29, 1979,
9 as required by RCW 90.03.280.¹

10 Objections to the granting of a permit were received from all
11 appellants who contended that the water sought by Skane was not public
12 water but waste, seepage, or return flow waters resulting from
13 activities associated with the Columbia Basin Project, and thereby not
14 subject to appropriation. DOE concedes that underground water results
15 from activities associated with the Columbia Basin Project.

16 III

17 On May 15, 1972, the U. S. Bureau of Reclamation was issued
18 Reservoir Permit No. R3-00013P for storage of 200,000 acre-feet of
19 water in Potholes Reservoir. The source of water for Potholes
20 Reservoir includes all unappropriated surface water of Crab Creek, and
21 the naturally occurring surface water across the Skane property. As a

22
23 1. The category of water, be it "surface" or "ground," involves
24 similar applications for and notices of appropriation. RCW
25 90.03.260 - .280; RCW 90.44.060. WAC 508-12-220.

1 result of the permit issuance, there are no unappropriated surface
2 waters available for consumptive use.

3 IV

4 Skane's hatchery consists of a 1,500 foot long ditch which
5 collects water from the seep area to two rows of ponds. The ponds in
6 each row are constructed on a slope so that one pond empties into the
7 next. The outflow at the last pond in each row flows through a ditch
8 and into Crab Creek, one-half mile away.

9 V

10 The collection ditch is about 15 feet deep and intercepts water in
11 the ground. The four to five feet of water that may be observed in
12 the ditch would, in the natural course of its flow, appear as water
13 surfacing on the land before reaching Crab Creek. The character of
14 the area affected by the surfaced water is that of a wetland, ponds,
15 and marsh. This characteristic is a result of an increase in ground
16 water levels attributable to U. S. Bureau of Reclamation activities in
17 the Quincy ground water subarea described in chapter 173-134 WAC.

18 VI

19 There are no public ground waters available for consumptive
20 appropriation in the Quincy Basin Subarea. Artificially stored ground
21 waters are available for purchase from the Bureau.

22 VII

23 Any Conclusion of Law which should be deemed a Finding of Fact is
24 hereby adopted as such.

25 From these Findings of Fact come these

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1 CONCLUSIONS OF LAW

2 I

3 "Surface" waters of the state are regulated by chapter 90.03 RCW.

4 "Ground" waters of the state are regulated by chapter 90.44 RCW.

5 "Ground" waters are defined in RCW 90.44.035:

6 All waters that exist beneath the land surface or
7 beneath the bed of any stream, lake or reservoir, or
8 other body of surface water within the boundaries of
9 this state, whatever may be the geological formation
10 or structure in which such water stands or flows,
11 percolates or otherwise moves, are defined for the
12 purposes of this chapter as "ground waters." There
13 is recognized a distinction between: (1) Water that
14 exists in underground storage owing wholly to natural
processes; for the purposes of this chapter such
water is designated as "natural ground water." (2)
Water that is made available in underground storage
artificially, either intentionally, or incidentally
to irrigation and that otherwise would have been
dissipated by natural waste; for the purposes of this
chapter such water is designated as "artificially
stored ground water."

15 Cf. WAC 173-134-020(1), (6), (8); RCW 18.104.020(5)

16 II

17 The ground water code, chapter 90.44 RCW, is supplementary to the
18 surface water code, chapter 90.03 RCW. RCW 90.44.020. As for the
19 relative rights between competing ground and surface water uses,
20 "first in time, first in right" applies. WAC 508-12-230. Cf. RCW
21 90.03.010.

22 III

23 The category of water as found upon Skane's property without the
24 infiltration trench would have become "surface" water. Developing
25 that water source as surface water at a point where it was technically

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1 ground water, but was destined shortly to be surface water does not
2 violate the intent of either the ground water code (RCW 90.44) or the
3 surface water code (RCW 90.03). Ground and surface waters are
4 interrelated. RCW 90.54.020(8). An administrative interpretation of
5 this relationship and the selection of the appropriate water code has
6 been made by DOE. We conclude that the decision was factually based
7 and upon a reasonable interpretation of the water codes. It was
8 proper to classify the water as "surface" water.

9 IV

10 Any Finding of Fact which should be deemed a Conclusion of Law is
11 hereby adopted as such.

12 From these Conclusions of Law the Board enters this
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ORDER

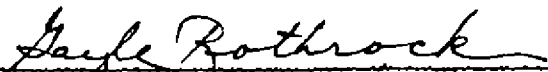
The Department of Ecology determination that the water to be appropriated under permit S3-26217 is surface water is affirmed.

A hearing shall be scheduled to determine the remaining issues presented in this case.

DONE this 23rd day of August, 1982.

POLLUTION CONTROL HEARINGS BOARD


DAVID AKANA, Lawyer Member


GAYLE ROTHROCK, Vice Chairman

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FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of the Washington State Department of Ecology's order that a permit for appropriation of public surface water be granted to Mr. and Mrs. Collin E. Skane, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman and Gayle Rothrock, Member, convened at Moses Lake, Washington on March 27 and 28, 1986. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant RCW 43.21B.230.

1 The parties were represented by counsel as follows:

2 1. U.S. Bureau of Reclamation (formerly U.S. Water and Power
3 Resources Service) byWilliam Dunlop, Field Solicitor.

4 2. East Columbia Basin Irrigation District and South Columbia
5 Basin Irrigation District by
6Richard A. Lemargie of LeMargie, Whitaker & Cordell.

7 3. Quincy-Columbia Basin Irrigation District by
8John W. Baird of Baird, White & Schultheis.

9 4. State of Washington, Department of Ecology by
10Allen T. Miller, Jr., Assistant Attorney General.

11 5. Collin E. and Leora Skane by
12William J. Plonske, Attorney at Law.

13 Reporter Malinda Avery recorded the proceedings.

14 Witnesses were sworn and testified. Exhibits were examined.
15 Post-hearing briefs were requested. The briefing cycle was completed
16 on June 9, 1986. From testimony heard and exhibits examined, the
17 Pollution Control Hearings Board makes these

18 FINDINGS OF FACT

19 I

20 This matter arises north of Moses Lake in Grant County at the
21 Gloyd Seeps.

22 II

23 Prior the advent of the United States Columbia Basin Project
24 ("Project") the lands brought into question by this appeal were highly
25 dessicated. On the particular site in question there were no surface

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1 waters. Moreover, it is probable that such waters as did exist were
2 sufficiently below land surface as to be unreachable, except by
3 digging or drilling deeper than has yet occurred.

4 III

5 After the advent of the Project the site in question became laden
6 with waters imported artificially by the Project. The means by which
7 this occurred, and the surrounding circumstances are these: First,
8 the Project commenced diversion of water from the Columbia River at
9 Grand Coulee Dam. This is pursuant to Washington State Permit to
10 Appropriate Public Surface Waters No. 15994, priority date May 16,
11 1938, granted to the Project operator, United States Department of the
12 Interior, Bureau of Reclamation ("Bureau"). This diversion was for
13 the purpose of irrigating 600,000 acres of lands in Washington State.
14 Through an elaborate system of pumps, canals and other works these
15 waters were moved southward and put to irrigation use north of the
16 site in question. Despite the application of only so much water as is
17 needed by the soil, it was foreseen that certain waters would permeate
18 downward after application to the crop lands and then continue
19 migrating southward either as ground or surface waters. These are
20 referred to as waste, seepage and return flows ("WSR"). It is this
21 WSR which crosses the site in question and empties into Crab Creek.
22 Once there, it flows to the Potholes Reservoir where it is recaptured
23 and routed further southward by other Project works for irrigation of
24 lands south of the site in question. It is accurate to say that the
25 water at issue is passing through a pre-determined course beginning

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1 far north of the site in question and ending far south of it.

2 IV

3 Although the Bureau also holds the rights to all unappropriated
4 water of Crab Creek for storage in Potholes Reservior (Washington
5 State Reservior Permit No. R300013P) it does rely, in addition, upon
6 the entire quantity of WSR just described for Project irrigation of
7 lands south of Potholes Reservior. The contract between the Bureau
8 and the affected Irrigation Districts, dated December 18, 1968, and
9 now in effect provides:

10 WASTE, SEEPAGE, AND RETURN FLOW WATERS

11 24(a). The United States does not abandon or
12 relinquish any of the waste, seepage, or return
13 flow waters attributable to the irrigation of the
14 lands to which water is supplied under this
15 contract. All such waters are reserved and
16 intended to be retained for the use and benefit of
17 the United States as a source of supply for the
18 project. The recapture and/or reuse of waste,
19 seepage, or return flow waters for further
20 utilization by the District through the irrigation
21 system shall not be considered as inconsistent with
22 the intent of Article 32. (emphasis added).

23 V

24 Those persons engaged in a business for profit are charged a fee
25 by the Bureau for water service. This is the means established by
26 federal law for reimbursing the cost of constructing and operating the
27 expansive works of the project. Currently, those receiving irrigation
waters pay approximately \$21 per acre per year to the Bureau for the
waters provided.

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1 VI

2 By 1973, the constant passage of Project WSR waters through the
3 site in question had created an extensive marsh which its owner had
4 opened to duck hunting. In 1973 that same owner, Herman L. Jones,
5 entered into a water service contract with the Bureau for the purpose
6 of developing fish rearing and holding ponds on the site. This
7 provided for payment of \$400 per year.

8 VII

9 In 1975, respondents Collin E. and Leora Skane purchased the site
10 in question, some 120 acres. They entered into further water service
11 contracts with the Bureau, and began development of a fish hatchery.
12 Through trenches dug into the hillside they intercepted and diverted
13 the Project WSR waters into a system of fish hatchery ponds. They
14 have since engaged in fish rearing as a commercial enterprise, and
15 sell their trout to commercial buyers in many states and also in
16 Canada.

17 VIII

18 Soon after the establishment of the hatchery, the Washington State
19 Department of Fisheries (DOF) inquired whether Mr. Skane possessed a
20 permanent water right. This was antecedent to granting a DOF permit
21 which was necessary at that time. In reviewing his water service
22 contract with the Bureau, Mr. Skane discovered a clause by which the
23 Bureau reserved the right to divert water away from the hatchery at
24 any time. Paragraph 8(e), p. 2, Exhibit A-38. From this he concluded
25 that his hatchery investment was in jeopardy because he had no

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1 permanent or vested water right. Therefore he ceased payment to the
2 Bureau under his water service contract in 1978. The contract
3 provided for \$250 per year when payment ceased. Thereafter, in April,
4 1979, he applied to respondent, Washington State Department of Ecology
5 (DOE) for a permit to appropriate public surface water with reference
6 to the same Project WSR waters for which he had just ceased paying the
7 Bureau. He did not endeavor to negotiate with the Bureau concerning
8 the clause to which he objected in the water service contract before
9 taking these actions.

10 IX

11 The precedent established by DOE's predecessor, Washington State
12 Department of Water Resources in the matter of one Allen E. Rotta who
13 applied in 1968 for irrigation use of Project WSR waters was that said
14 application should be rejected because:

15 "At this point in time these waters must be
16 considered to be waste, seepage and return
17 flow attributable to the Columbia Basin
18 Project, and since they occur within the
19 project boundaries, cannot be considered
20 public waters subject to appropriation."

19 X

20 In considering Mr. Skane's application for a public water
1 appropriation permit DOE found, as we find now, that the proposed use
2 of the water by Mr. Skane would be non-consumptive. Only negligible
3 amounts would be lost to evapo-transpiration as waters pass through
4 the hatchery ponds. As much water, or more, empties from the site
5 into Crab Creek with the establishment of Mr. Skane's hatchery as

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1 before. The hatchery does not impair, reduce or delay the flow of
2 Project WSR waters into Potholes reservoir or their delivery to
3 irrigated lands thereafter.

4 XI

5 The Skane application for a public water appropriation permit was
6 recommended for approval by DOE on February 13, 1980. From this,
7 appellants Bureau and Irrigation Districts appealed to this Board on
8 March 13, 1980. The proceedings before this Board were bifurcated
9 such that the question of whether the waters were ground or surface
10 waters was decided first. By our earlier Findings, Conclusions and
11 Order entered in August, 1982, the waters were determined to be
12 surface waters. This decision was appealed to the Superior Court for
13 Grant County by the Bureau and Irrigation Districts. The decision was
14 affirmed, and the cause was remanded here by the Court in March,
15 1986. All remaining issues are now before us.

16 XII

17 It is Mr. Skane's understanding that issuance of a state water
18 appropriation permit will remove the possibility that water could be
19 diverted away from his hatchery by the Bureau, and will remove the
20 obligation to pay a water service fee to the Bureau.

21 XIII

22 In the course of this hearing the Bureau disclosed, without
23 objection, that it offered a water service contract to Mr. Skane
24 containing assurance of a 40 year non-interruptible water supply at
25 \$250 per year.

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1 XIV

2 Any Conclusion of Law which is deemed a Finding of Fact is hereby
3 adopted as such.

4 From these Findings of Fact the Board comes to these

5 CONCLUSIONS OF LAW

6 I

7 For the reasons which follow, the public surface water
8 appropriation permit to be granted to Mr. and Mrs. Skane by DOE is
9 unlawful and should be reversed.

10 II

11 Permits for appropriation of public surface water must be in
12 compliance with the State Water Code of 1917, chapter 90.03 RCW.

13 III

14 The Water Code requires essentially four determinations prior to
15 the issuance of a water right permit:

- 16 1) what water, if any, is available
17 2) to what beneficial uses the water is to be applied
18 3) will the appropriation impair existing rights; and
19 4) will the appropriation detrimentally affect the public welfare.

20 Stempel v. Dept. of Water Resources, 82 Wn.2d 109 (1973).

21 IV

22 The subject permit fails under the first of these criteria because
23 water is not available as envisioned in the Water Code. The Code
24 provides:

25 "But where there is no unappropriated water in the
26 proposed source of supply . . . it shall be the

27 FINAL FINDINGS OF FACT,
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1 duty of the supervisor [DOE] to reject such
2 application and refuse to issue the permit asked
for". RCW 90.03.290 (emphasis added).

3 Thus, for water to be available for public appropriation it must be
4 not only existent but must, in addition, be unappropriated water.

5 V

6 From earliest times it has been held that an appropriation of
7 water consists of an intention to appropriate followed by reasonable
8 diligence in applying the water to a beneficial use. In Re: Alpowa
9 Creek, 129 Wash. 9, 13 (1924), In Re: Doan Creek, 125 Wash. 14 (1923),
10 Sander v. Bull, 76 Wash. 1 (1913), Ellis v. Pomeroy Improvement
11 Company, 1 Wash. 572, 578 (1889).

12 VI

13 The waters at issue were intentionally appropriated by the Bureau
14 from the Columbia River and applied with reasonable diligence to
15 beneficial use. This was accomplished by a lawful state permit and
16 these are appropriated waters. Although these waters have already
17 been appropriated by the Bureau, the subject permit would allow
18 appropriation of the same waters by Mr. Skane. This is contrary to
19 the cited provision of RCW 90.03.290 calling for denial of
20 applications where the proposed supply contains no unappropriated
21 water.

22 VII

23 The DOE urges that the non-consumptive character of the proposed
24 use is an overriding factor in this case. This apparently explains
25 its departure from the Rotta application which concerned a proposal

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1 for consumptive use of Project WSR waters. While the non-consumptive
2 character of use does render the proposal consistent with the third
3 criteria of the Water Code that there be no impairment of existing
4 rights, yet it remains inconsistent with the first criteria that water
5 be available for appropriation. Availability is lacking where, as
6 here, there is no unappropriated water in the water supply. Nothing
7 in RCW 90.03.290 makes an exception to the requirement of water
8 availability even where the use would be non-consumptive.

9 VIII

10 The reasoning which supports the statutory rule against public
11 appropriation of water already appropriated is, we think, that stated
12 by Hutchins as the general rule of western water law:

13 "The general rule is that one who diverts water
14 from a natural stream pursuant to a valid right of
15 diversion and use becomes the owner of the
particles of water."

16 Water Rights Laws in the Nineteen Western States, Wells A. Hutchins,
17 1971, Volume I, p. 144. This is the rule in Washington. Madison v.
18 McNeal 171Wash. 669, 674 (1933). In this case the Bureau has diverted
19 water from a natural stream, the Columbia River, pursuant to a valid
20 right of diversion. It has become the owner of the particles of water
21 at the site in question. Such water is subject to an agreement for
22 its sale or use. See Madison, supra, Methow Cattle Co. v. Williams,
23 64 Wash.457, 460 (1911) and Thorpe v. Tenem Ditch Co., 1 Wash. 566,
24 570 (1889). The water now under consideration is therefore not any
25 longer public surface water as addressed by the Water Code because, in

26 FINAL FINDINGS OF FACT,
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1 the words of RCW 90.03.010 a "right thereto or to the use thereof" has
2 been "acquired. . . by appropriation" and the appropriated water at
3 issue is private property of the Bureau as appropriator. It was
4 therefore improper to approve a permit to appropriate public surface
5 water where, as here, there is none.¹ The permit should be reversed.

6 IX

7 Even were these Project WSR waters relinquished back into the
8 public domain (which they are not where, as here, they are within
9 Project boundaries and recaptured for further use²) a public right
10 of appropriation therein could not be used to compel the continued
11 release of such waters to the second appropriator. Stevens v. Oakdale
12 Irrigation District, 13 Cal. 2d 343 (1939) and Miller v. Wheeler, 54
13 Wash. 429 (1909). Thus, even the proffered public permit would not
14 provide protection against the interruption of Mr. Skane's water
15 supply by the Bureau as original appropriator. Consequently, this
16 application for a public permit could not, in any event, provide the
17 relief which apparently caused the application to be made.

18
19 1/ This conclusion is unaltered by the fact, raised by DOE, that we
20 have held similar waters to be "waters of the state" as that term is
21 used in the Water Pollution Control Act. Courtright Cattle Co. v. DOE
22 PCHB No. 83-11 (1983). "Waters of the state" defines the scope of
state authority to regulate against pollution, not the authority to
permit water appropriation which is as set out above.

23 2/ See U.S. Bureau of Reclamation v. Department of Ecology and
24 Schrom, PCHB Nos. 84-64, et. seq. (1985) and cases cited therein where
25 migration of the water beyond Project boundaries and lack of recapture
were each held necessary to a "relinquishment of the water
particles." Neither element is present in this case.

X

Assuming for the sake of argument that the Project WSR waters at issue were public waters available for appropriation (as we have concluded they are not) the Skane permit would detrimentally affect the public welfare, and for that reason should be reversed. This is so because it has been shown, generally, that those who engage in business for profit pay fees for the water imported by the Project. This same water is the lifeblood of the business begun for profit by Mr. Skane. That his business should escape payment for these imported waters would be detrimental to those who do pay, and to the public provider of these waters, and thus to the public welfare.

XI

In summary, we conclude that the permit in question is inconsistent with RCW 90.03.290, and should be reversed. Because of this, we need not reach the question of whether DOE is estopped to argue that the water right of the Bureau is limited to uses which do not include fish rearing. We observe, for the guidance of the parties, that this record is replete with correspondence between the Bureau and DOE or its predecessor agencies to the effect that minor non-irrigation uses under the Bureau's permit, some far larger than this one, can be handled in due course. We see no reason why this should not be so. Moreover, we see nothing in the outcome of this controversy which is inimical to the long term, successful operation of respondents' fish hatchery. Indeed, all parties to this appeal appear to be motivated by a common desire for water to be dedicated to

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1 | this beneficial use.

2 | XII

3 | Any Finding of Fact which is deemed a Conclusion of Law is hereby
4 | adopted as such.

5 | From these Conclusions of Law the Board enters this
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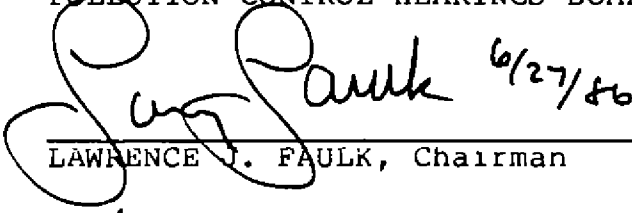
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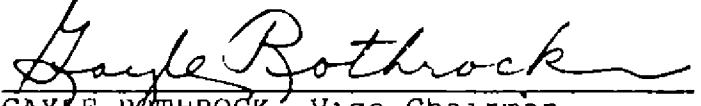
ORDER

The recommendation for approval of a public surface water appropriation permit to Collin E. and Leora Skane is hereby reversed.

DONE at Lacey, Washington this 27th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD

 6/27/86
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice-Chairman


WILLIAM A. HARRISON
Administrative Appeals Judge

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